

**LEGAL ETHICS AND PROFESSIONALISM
MATERIALS**

LPPE INTENSIVE WEEK

Organizing Committee:

**Hon. Robert Armstrong
Hon. Michael Code
Hon. Stephen Goudge
Hon. Joan Lax
Hon. Alison Harvison Young
Prof. Ayelet Shachar
Prof. Lorne Sossin
Prof. Simon Stern**

November 2009

**Faculty of Law
University of Toronto**

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**These materials are intended for the sole educational use of students at the
University of Toronto's Faculty of Law**

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FACULTY OF LAW
UNIVERSITY OF TORONTO

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MATERIALS

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Law Society of Upper Canada – History, Chronology, Equity and Diversity in the Legal Profession, The Changing Face of the Legal Profession;	15
Kate Fillon, “Lawyers are Rats” interview with Philip Slayton (Maclean’s 2007);.....	22
Canadian Bar Association “CBA Condemns Unfair Characterization of Lawyers in Maclean’s Magazine (Press Release, 2007);	27
Letters to the Editor (Maclean’s 2007);	28
Editorial “Not Just a Lone Voice in the Wilderness” (Maclean’s 2007);.....	30

Recommended

Fiona Kay, “Integrity in a Changing Profession: Issues of Diversity and Inclusion”;

Harry W. Arthurs, “Lawyering in Canada in the 21st Century” (1996) 15 Windsor Yearbook of Access to Justice 202;

Constance Backhouse, “Gender and Race in the Construction of “Legal Professionalism”: Historical Perspectives;

Day 2: Lawyers Responsibility to Clients

Required

- Gavin MacKenzie, *Lawyers and Ethics* (Toronto: Carswell, 1998), ch. 4; 32
- Edward L. Greenspan and George Jonas, *Greenspan: The Case for the Defence* (Toronto: MacMillan), ch. 15; 44
- Alan Dershowitz, “Defending the Offensive: Judging Who Deserves Representation is Dangerous” (Washington Post, 1997); 50
- Ronald Goldfarb, “Guilt by Association: Lawyers Should be Judged by the Clients they Keep” (Washington Post, 1997); 53

Day 3: Conceptual Approaches to Legal Ethics & Access to Justice

Conceptual Approaches to Legal Ethics

Required

- T. Farrow, “Sustainable Professionalism” (2008) 46 Osgoode Hall Law Journal 51 at pp.51-59, 83-103;.....55
- Randal N.M. Graham, “Morality vs. Market: An Economic Account of Legal Ethics”; 85

Recommended

- Deborah Rhode, “The Advocate’s Role in the Adversary System” in *In The Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000);
- Alan Hutchinson, “An Alternative Vision: A Contextual and Pragmatic Approach” in *Legal Ethics and Professional Responsibility* (Toronto: Irwin, 1999);
- Rob Atkinson, “How The Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day” (1995) 105 Yale L.J. 177;
- Adam Dodek, “Canadian Legal Ethics: Ready for the 21st Century at Last” (2008) 46 Osgoode Hall Law Journal 1-20 (Excerpt);

Lawyers Responsibility to Society & Access to Justice

Required

Hon. Chief Justice Beverly McLachlin, “The Challenges We Face” (Remarks to the Empire Club of Canada, March 8 2007);	106
L. Sossin, “The Public Interest, Professionalism, and <i>Pro Bono Publico</i> ” (2008) 46 Osgoode Hall Law Journal 131;	120
<i>Canadian Bar Association v. British Columbia</i> 2006 BCSC 1342 (headnote + pp.8-10);.....	148
Avvy Go, “Pro Bono Can’t Replace Legal Aid” (Toronto Star) May 13, 2004;	153
Overview of Legal Aid Ontario;	154
Overview of Pro Bono Law Ontario;	161

Recommended

M. Trebilcock, Legal Aid Review (2008) “Executive Summary”	
Justice J.C. Major, “Lawyer’s Obligation to Provide Legal Services” (1995) 32 Alberta L. Rev.;	
Rob Atkinson, “Historical Perspectives on Pro Bono Lawyering: A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best” (2001) 9 American University J. of Gender, Social Policy & Law 129;	
Reed Elizabeth Loder, “Tending the Generous Heart: Mandatory Pro Bono and Moral Development” (2001) 14 Georgetown J. of Legal Ethics 459;	

Day 4: Ethical Touchstones: Criminal Law and Business Law

Ethical Touchstones & Criminal Law

Required

Justice Michel Proulx and David Layton, <i>Ethics and Canadian Criminal Law</i> (Toronto: Irwin, 2001), ch. 4 “Confidentiality” (Excerpt);	163
Michael Code & Kent Roach, “The Independence of the Bar and the Public Interest: The Scope of Privilege and Confidentiality in the Context of National Security” (2006) 52 Criminal Law Quarterly 85 (Excerpt);	166

Kent Roach, “Smoking Guns: Beyond the Murray Case” (2000) 43 C.L.Q. 409;	170
Justice Michel Proulx and David Layton, <i>Ethics and Canadian Criminal Law</i> (Toronto: Irwin, 2001), ch. 9 (Excerpt);	172
Forbes.com “The Corporate Scandal Sheet” (2002);	177
Deborah Rhode and Paul Paton, “Lawyers, Ethics and Enron” (2002) Stanford Journal of Law, Business and Finance 9;	182
Paul Paton, “Suddenly They’re Holding Corporate Counsel to a Higher Standard” (Globe and Mail, 2007);.....	194
Paul Paton, “Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era” (2006) 84 La Revue du Barreau Canadien 533-40 (Excerpt);.....	195

Recommended

Mark A. Sargent, “Lawyers in the Moral Maze” (2004) 49 Villanova Law review 867;	
Geoffrey Miller, “From Club to Market: The Evolving Role of Business Lawyers” (2005-2006) 74 Fordham Law Review 1105;	

Ethics and Business Law – Problems	1-4
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**University of Toronto, Faculty of Law
Legal Process, Professionalism & Ethics
Intensive Week on Legal Ethics & Professionalism
November 2-5, 2009**

**Monday, November 2:
Convocation Hall, Law Society of Upper Canada**

1:30—1:45 p.m.	Welcome	Mayo Moran Stephen Goudge Derry Millar
1:45—2:30 p.m.	The History and Decline of Professionalism	David Scott
2:30—2:50 p.m.	Centre for the Legal Profession DVD on Professionalism	
2:50—3:15 p.m.	BREAK (Coffee & Cookies)	
3:15—3:45 p.m.	Women & the Profession	Linda Rothstein
3:45—4:30 p.m.	Professional Regulation	Mark Sandler

**Tuesday, November 3:
Bennett Lecture Hall (BLH), Flavelle House**

12:00—2:00 p.m.	Ethics in Legal Practice: Small Group Discussions with Graduates in Different Areas of Practice	Nikki Gershbain & Rob Centa
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(A list of the small groups, room assignments, and facilitators will be distributed. Pizza will be provided.)

2:15—3:15 p.m.	Question and Answer Session Based on Small Group Discussion	Justice Colin Campbell (Moderator)
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3:15pm Coffee & cookies

6:00p.m.—8:00 p.m.	The Lawyer's Responsibility to Clients and Access to Justice	Robert Armstrong (Chair) Edward Greenspan Q.C. & Alan Hutchinson
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Wednesday, November 4 (BLH)

10:00—12:00 noon	Different Approaches to Legal Ethics	Ayelet Shachar (Chair) Randal N.M. Graham Trevor Farrow Paul Paton
1:30—4:00 p.m.	Lawyer's Responsibility to Society and Access to Justice	Justice A. Harvison Young (Chair) Lenny Abramawicz Paul Schabas Adam Dodek Andrew Pinto

Thursday, November 5, 2009 (BLH)

10:00—12:00 p.m.	Ethical Touchstones and Criminal Law	Justice Michael Code (Chair) David Layton Ken Campbell Marlys Edwardh
12:00—1:30 p.m.	Professionalism & Career Choice CDO led session (Pizza lunch available)	
2:00—4:00 p.m.	Ethical Touchstones and Business Law	Justice Joan Lax (Chair) Anita Anand Jeremy Freiberg Paul Paton
4:00—4:10 p.m.	Wrap Up	Stephen Goudge Lorne Sossin

Ethics and Business Law – Problems

Problem 1

You have long been outside counsel to Sleepware, Inc., a clothing manufacturer. The company makes a line of children's pajamas that is a big seller. Recent tests have shown, however, that the pajama fabric can catch fire if a match is held against it for a few seconds.

Sleepware's Vice President for this product line wants to keep selling the pajamas. Regulations of the Consumer Product Safety Commission (CPSC) prohibit sale of products known to cause burns to children, but the Vice President believes the CPSC is unlikely to recognize the potential injuries the pajamas could cause.

Further, the Vice President points out that experts he has consulted with say that no more than one in 50,000 children would hold the matches long enough for the pajamas to catch fire. The experts admit that if the pajamas catch fire, a child's injuries could be expected to be severe, but a management consulting firm has estimated that civil damages would not exceed \$250,000 per victim. Sleepware sells 200,000 units each year and the company makes an annual profit of \$2,000,000 on this product.

You have not been asked for advice about whether to market this product; you only learned about the flammability while working on an unrelated matter. Indeed, the Vice President is annoyed that you have raised the issue with him. "The President will retire soon, and I am his natural successor. My enemies in the company would love to embarrass me with this." He suggests that in light of your loyalty and long service, he had been willing to help secure your nomination to the company's Board of Directors.

[Adapted from Morgan and Rotunda, *Professional Responsibility: Problems and Materials*, 10th edition.]

Question A: What steps are you required to take in the situation presented? Do you have to accept the Vice President's direction to drop the matter as final?

Question B: May you report the dangerous product to the CPSC?

Question C: Should you serve on the board of directors if invited?

Problem 2

You are a mergers & acquisitions specialist in the Toronto office of one of Canada's pre-eminent business law firms. Rex Raider, the renowned dealmaker, calls to ask whether you and the firm can represent him in connection with his proposed hostile take-over bid

for XCo. You tell Rex that you are delighted that he has called and that you will run a conflicts search and get back to him.

The conflicts search reveals that two years ago one of your colleagues in the Toronto office, Jane Smith, a competition lawyer, had provided advice to XCo. in connection with a proposed M&A transaction that did not proceed. During the course of the retainer, Jane reviewed XCo.'s three year strategic plan and discussed sensitive pricing information with XCo.'s senior management. The matter is now closed and XCo. has not retained the firm on any new matters since that time.

Question: Can the firm represent Rex Raider, and if so under what circumstances?

Problem 3

Same facts as above, except the conflicts search shows that one of your colleagues in the Montreal office is currently representing XCo. in a small unrelated litigation matter involving a dispute with a former employee.

Question: Can the firm represent Rex Raider, and if so under what circumstances?

Problem 4

You represent HCo., a home improvement retailer. HCo. is preparing for an initial public offering. It has filed a preliminary prospectus on October 1, 2008 with the securities regulators in each of the provinces and territories that includes a forecast of its expected financial results for the year ended December 31, 2008. This is the third time that HCo. has tried to go public, with the previous two attempts scuttled by market conditions.

The Ontario Securities Commission (OSC), which is the lead regulator in reviewing the prospectus, has issued a comment letter on the prospectus in which it has asked whether the recent credit crisis and slowdown in the real estate market has had any effect on the assumptions used in the forecast. You consult with the CEO and CFO. They say that sales have softened and that some of the assumptions are a bit aggressive, but that they are confident that they can achieve the forecast results. You respond to the OSC and say "The assumptions in the forecast are reasonable and appropriate in the circumstances and comply with the requirements of applicable securities regulation."

The OSC clears HCo. for filing its final prospectus. The day before filing, you are in a meeting with the CEO, CFO and general counsel. They are all very excited as they have a number of stock options that will vest upon HCo. going public. You ask them how the fourth quarter is shaping up. The CFO says that she has just received the latest sales results and that sales are well behind the forecast. You ask whether the underwriters and the board of directors of HCo. know about the recent results. The CEO says that he hasn't informed them and doesn't intend to, as he believes that HCo. can still "make its

numbers” through a special promotion over the holiday season and he does not want to delay the offering and miss the current “market window”. He turns to the general counsel and says, “You agree, don’t you?” The general counsel says “I agree. Let’s proceed to file”.

Question A: Was the response to the comment letter appropriate?

Question B: Should you proceed to file the prospectus on the instructions of your client? If not, what steps should you take?

Problem 5

You are the lawyer responsible for your law firm’s relationship with ACo., a large public company and one of your firm’s biggest clients. The CEO of ACo., with whom you have a close working relationship, calls to tell you that she’s had preliminary discussions with the chairman of ACo.’s compensation committee about entering into a new executive employment agreement. The CEO asks you to draft her new executive employment agreement. She tells you that she wants a fair deal, but wants you to ensure that her interests are properly protected.

Question A: Can you act for the CEO, and if so under what circumstances?

Question B: Can you act for ACo. in negotiating against the CEO? Is this advisable?

Problem 6

You are corporate counsel and corporate secretary an international publishing company, working at its head office. You report directly to the company’s President. As part of your duties, you attend all meetings of the board of directors, prepare minutes, and implement corporate decisions made by the board, on which the company’s President and CEO and certain other senior executives sit.

The board of directors decides to sell a number of its publishing assets, consisting of community newspapers in different smaller cities across the United States. The Board of Directors passes appropriate resolutions directing management to implement this policy decision. Six different transactions are undertaken, each for a different newspaper being sold. While the terms and conditions and prices vary, in each one of the transactions a certain portion of the proceeds of sale is earmarked as “non-competition” payments made directly to company senior executives. The purchasers of the newspapers have not sought non-competition clauses or payments and don’t care how the payments are structured as long as the total purchase price remains the same; the company’s external accountants have advised that arranging the transactions this way would have tax advantages. The company senior executives believe that such payments appropriately recognize their time

and effort in making the newspapers being sold successful. The payments to executives range from \$400,000 in one sale, to \$52,000,000 in another.

You undertake the job of implementing the transactions and “papering” the deals. You don’t benefit personally from the non-competition payments, but receive a \$150,000 bonus at the end of the year in recognition of your efforts in the documentation and closing of each transaction.

Question A: What issues arise as a result of your participation in the documentation and closing of the transactions?

Question B: What duties, if any, do you have to external authorities in respect of the transactions?

Question C: Does it matter that you’ve only received a year-end bonus and none of the funds earmarked as “non-competition” payments?

